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IN THE

Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE COALITION FOR ASBESTOS JUSTICE, INC. IN SUPPORT OF PETITIONERS

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COALITION FOR ASBESTOS JUSTICE, INC.'S MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 36 of the Rules of this Court, the Coalition for Asbestos Justice, Inc. ("Coalition") requests leave to file the accompanying brief as *amicus curiae* in support of the Petition for a Writ of Certiorari.[1]

[1] Respondents' counsel did not consent to the filing of *amicus* briefs in this action. Petitioners' blanket letter of consent has been lodged with the Clerk of the Court. In accordance with Rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and

The Coalition was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] This Coalition files *amicus* briefs in important cases, such as this one, that may have a significant impact on the asbestos litigation environment.

The Coalition seeks leave to file a brief in this case because we are concerned about problematic trends in asbestos litigation. As far back as 1991, the Judicial Conference described a looming "disaster of major proportions." Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 2 (Mar. 1991). Five years ago, the Court recognized that this country is in the midst of an "asbestos-litigation crisis." *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997). Since then, the crisis has worsened. *See* The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org. Claims continue to pour in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick

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no person or entity, other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

are threatened. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

The rate of new filings and the mounting number of pending cases have only exacerbated the crisis. Long delays in resolving claims remain routine. *See* Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383 (1993). Bankruptcies increasingly threaten the ability of asbestos defendants to compensate seriously ill plaintiffs, now and in the future. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002). The total cost to the economy is staggering.

Courts themselves are partly to blame for the ever-growing "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School). In lowering the legal barriers to recovery, courts have invited more and more claims. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000). Today, the vast majority of new asbestos claimants are unimpaired or only mildly impaired. Payments to those claimants have encouraged still more filings, forcing scores of companies into bankruptcy. Those bankruptcies, in turn, have put more pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out companies with attenuated connections to asbestos, such as Petitioner Mobil Corporation. *See, e.g.*, Susan Warren, *Asbestos Suits Target*

Makers of Wine, Cars, Soups, Soaps, Wall St. J., Apr. 12, 2000, at B1.

The instant case exemplifies the problems that are created when courts allow the mass resolution of asbestos claims to predominate over fairness or sound public policy. As West Virginia Supreme Court of Appeals Justice Elliott Maynard has explained:

> [T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). There will be virtually no opportunity for any defendant in the action to contest the individual claims against it. Furthermore, any defendant deciding to run the risk of such a massive trial may be subject to enormous punitive damages liability. The coercive terms of the plan obviously contemplate (or count on) mass settlements to simplify trial matters and block post-trial review. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"). Such procedural shortcuts are not permitted by due process.

Furthermore, the West Virginia trial plan represents bad public policy because it will worsen the litigation crisis. The plan will encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants."

The Coalition for Asbestos Justice, Inc. is well-suited to bring these matters to the Court's attention. Accordingly, the Coalition requests that the Court grant its motion for leave to file the accompanying *amicus curiae* brief in support of the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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COALITION FOR ASBESTOS JUSTICE, INC.'S BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Coalition for Asbestos Justice, Inc. ("Coalition") was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by

[1] No counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

property and casualty insurers, the Coalition's mission is to encourage fair and prompt compensation to deserving current and future asbestos litigants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.[2] In important cases that may have a significant impact on the asbestos litigation environment, the Coalition files *amicus curiae* briefs before state courts of last resort and this Court.

STATEMENT OF THE CASE

The Coalition adopts and incorporates Petitioners' statement of the case.

SUMMARY OF ARGUMENT

Five years ago, the Court in *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 597 (1997), recognized that this country is in the midst of an "asbestos-litigation crisis." Since then, the crisis has worsened. *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001). Today, the vast majority of new asbestos claimants are unimpaired or only mildly impaired. Payments to those claimants have encouraged still more filings, forcing scores of employers into bankruptcy. Those bankruptcies, in turn, have put more pressure on the remaining solvent defendants and encouraged plaintiffs and their lawyers to seek out companies with attenuated connections to asbestos. Household names such as Gerber Products Co., Ford Motor Co., Campbell Soup Co., AT&T Corp., and Petitioner Mobil Corporation, among others, have been

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[2] The Coalition for Asbestos Justice, Inc. includes the following: ACE-USA, Chubb and Son, CNA service mark companies, Fireman's Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

named as defendants. *See* Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1.

Courts themselves are partly to blame for the ever-growing "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see also The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. at 43 (July 1, 1999) (statement of Professor William N. Eskridge, Yale Law School) [hereinafter "Eskridge Testimony"]. In lowering the legal barriers to recovery, courts have fueled the fire, inviting more and more claims. *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247, 248 (2000) [hereinafter "Schwartz & Lorber"].

The courts have undoubtedly acted with the best of intentions – faced with overwhelming numbers of asbestos claims, they have worked to put money in the hands of the sick as quickly as possible, and also to clear crowded dockets. The "pile on" litigation situation is reflected in a thoughtful statement by former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr., who observed:

> Think about a country circuit judge who has dropped on her 5,000 cases all at the same time . . . . [I]f she scheduled all 5,000 cases for one week trials, she would not complete her task until the year 2095. The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed

> and dictate case consolidation even where the rules may not allow joinder.

The Fairness in Asbestos Compensation Act of 1999: The Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. (July 1, 1999)(statement of the Hon. Conrad L. Mallett, Jr.) [hereinafter Mallett Testimony].

Justice Mallett's observation explains how courts, such as those in West Virginia, may view "mass joinder" and "jumbo" consolidations as a quick way to resolve the worsening asbestos litigation problem. In such proceedings, as here, people with serious illnesses, such as mesothelioma or lung cancer, are lumped together with the unimpaired. The goal is to produce settlements with low transaction costs, even if it means trampling over the due process rights of defendants and the truly sick. Efficiency is promoted over fairness or reason. In cases that do not involve asbestos, judges would not consolidate or join cases when plaintiffs suffer completely different types of injuries, or no injury at all.

As it turns out, bending procedural rules to put pressure on defendants to settle, *see* Eskridge Testimony at 39-40, brings no lasting efficiency gains. Rather than making cases go away, it invites new ones. *See* Schwartz & Lorber, *supra,* at 248. As mass tort expert Francis McGovern has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam." Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

The instant case exemplifies the problems that are created when courts allow the quick resolution of asbestos

claims to predominate over all other issues in litigation. As West Virginia Supreme Court of Appeals Justice Elliott Maynard explained:

> [T]his litigation involves thousands of plaintiffs; twenty or more defendants; hundreds of different work sites located in a number of different states; dozens of different occupations and circumstances of exposure; dozens of different products with different formulations, applications, and warnings; several different diseases; numerous different claims at different stages of development; and at least nine different law firms, with differing interests, representing the various plaintiffs. Additionally, the challenged conduct spans the better part of six decades.

State ex rel. Mobil Corp. v. Gaughan, 565 S.E.2d 793, 794 (W. Va. 2002) (Maynard, J., concurring). The obvious goal of the West Virginia proceeding is to try to force a mass settlement, even if it means trampling over the due process rights of defendants and the truly sick. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("judicial blackmail").

Such procedures only make matters worse. They encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants." This Court is uniquely situated to protect the litigants' due process rights. It should do so, and send a clear signal to

state courts that fairness and rationality must be restored to asbestos litigation.

For the foregoing reasons, *amicus curiae* requests that this Court grant the Petition for a Writ of Certiorari.

ARGUMENT

I. THE CURRENT CRISIS

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an "asbestos-litigation crisis." *Amchem*, 521 U.S. at 597. Many believed that asbestos litigation would be a serious but diminishing problem in the years to come.

Instead of declining, however, "the crisis is worsening at a much more rapid pace than even the most pessimistic projections." The Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002 (Nat'l Legal Center for the Pub. Interest monograph), available at http://www.nlcpi.org.[3] In 2001 alone, plaintiffs filed at least 90,000 new claims. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1. More recent projections estimate that up to 700,000 more cases are expected by the year 2050. *See Mass Tort Litigation Report Discusses Resolving Asbestos Cases Over Next 20 Years*, 14 Mealey's Litig. Rep.: Asbestos 22 (June 18, 1999). All told, the number of future claim-

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[3] *See, e.g.*, Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff – and Extracting Billions for Themselves*, Fortune, Mar. 4, 2002, at 154; Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9.

ants could reach as high as 3.5 million. *See* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991) [hereinafter "Judicial Conference Report"]. The total cost to the economy is staggering.[4]

The vast majority of new asbestos claimants are unimpaired – "people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by an asbestos-related disease and likely never will be." *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Comm. on the Judiciary,* 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School) [hereinafter "Edley Testimony"]. In *Amchem*, 521 U.S. at 629, Justice Breyer observed that "up to one half of asbestos claims are now filed by people who have little or no physical impairment." That number may be conservative. For instance, Professor Edley estimated in 1992 that claims by unimpaired plaintiffs then accounted for 60 to 70 percent of new claims, with the trend toward unimpaired claimants steadily increasing. *See* Edley Testimony at 5. Some current estimates are as high as 90

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[4] Ratings agency A.M. Best estimates that asbestos litigation already has cost U.S. companies over $21.6 billion, and may cost another $43.4 billion over the next 20 years. *See* Christopher Oster, *Some Insurers Face Shortfall in Reserves for Costly Claims Related to Asbestos*, Wall St. J., May 7, 2001, at A4. At least one consulting firm has put the total future cost of the litigation at $200 billion. *See Tillinghast-Towers Perrin Estimates Claims Associated with U.S. Asbestos Exposure Will Ultimately Cost $200 Billion*, June 13, 2001, available at http://www.towers.com/towers/locations/uk/press%20release/06-13-01.html. Former U.S. Attorney General Griffin Bell has explained that the cost "exceeds current estimates of the cost of all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks." Bell, *supra*, at 4.

percent. *See* Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* 3 (Dec. 2001), available at http://www.actuary.org/mono.htm.

The problem presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to "the sick and the dying, their widows and survivors." *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted); *see also In re Personal Injury and Wrongful Death Asbestos Cases*, Civ. Action No. 24-X-92-344501, at 5-6 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002) (Memorandum Opinion and Order Denying Modification to Inactive Docket Medical Removal Criteria) (Rombro, J.) ("With the number of companies that have declared bankruptcy, it would seem that the resources should be conserved for those who are substantially and demonstrably sick, or who are actually impaired, from exposure to asbestos."); Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 393 (1993); Mark A. Behrens & Monica Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001).[5]

Indeed, lawyers who represent the truly sick have expressed concern that recoveries by the unimpaired may so deplete available resources that their clients will be left without compensation. *See "Medical Monitoring and Asbestos Litigation" – A Discussion with Richard Scruggs and Victor*

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[5] Federal District Judge Charles Weiner, who oversees the federal asbestos multidistrict proceedings, has explained that "[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions," but they "are prone to be lost in the shuffle with pleural and other non-malignant cases." *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E. D. Pa. Sept. 12, 1996).

Schwartz, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos, Mar. 1, 2002, at 39 (Scruggs: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."); Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36 (quoting plaintiffs' lawyer Steve Kazan as stating that weak asbestos cases are taking awards that could go to legitimate claimants, such as mesothelioma victims).[6]

Payments to the unimpaired have played a critical role in forcing nearly 60 companies into bankruptcy. Each new bankruptcy puts "mounting and cumulative" financial pressure on the remaining defendants, whose resources are limited, *see* Edley & Weiler at 392, and removes one more source of funds from the pool available to asbestos claimants. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Mealey's Litig. Rep.: Asbestos, Vol. 16, No. 6., Apr. 20, 2001.

Bankruptcies also have led plaintiffs and their lawyers to expand their search for new "deep pockets," *see* Edley & Weiler at 384, 394-95; *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (Bankr. E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992), *opinion modified on reh'g*, 993 F.2d 7 (2d Cir. 1993), "from the asbestos makers to companies far removed from the scene of any putative wrongdoing." Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14; *see also* Editorial, *The Job-*

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[6] *See also* Susan Warren, *As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1; Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6.

Eating Asbestos Blob, Wall St. J., Jan. 23, 2002, at A22.[7] Defendants now include household names such as Gerber Products Co., Ford Motor Co., Campbell Soup Co., and AT&T Corp., among others. *See, e.g.*, Warren, *supra, at* B1; Richard B. Schmitt, *How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1. Petitioner Mobil Corporation is another example. Mobil is "not an 'asbestos company'" – it did not produce or market asbestos-containing products, and "has no corporate relationship with any entity that does." Pet. for a Writ of Cert. at 4.

In sum, the combination of forces at work in the asbestos litigation has set off a chain reaction, or domino effect: payments to the unimpaired have encouraged more filings by other unimpaired claimants; this has further depleted the assets of the defendant companies and forced many of them into bankruptcy; as more companies have been driven into bankruptcy, the process has accelerated because more and more liability is pushed over onto fewer and fewer companies; to make up for the shares of those companies, defendants with increasingly attenuated connections to asbestos are being pulled into the litigation; these peripheral defendants are now starting to collapse under the great weight of claims against them, just as the companies that came before them in the litigation. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331, 341-42 (2002).

Absent some change in the way that the courts handle asbestos cases, these problematic trends will only continue.

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[7] Already, some of the newer "peripheral defendants" with attenuated connections to asbestos have begun to declare bankruptcy. *See Engineering Firm Burns & Roe Files for Reorganization, Cites Recent Spike In Claims*, Vol. 15, No. 23 Mealey's Asbestos Rptr., Jan. 5, 2001.

See Deborah Hensler *et al., Asbestos Litigation in the U.S.: A New Look at an Old Issue* 50 (RAND Inst. for Civil Justice, 2001) (preliminary report) (predicting that "[a]ll of the major asbestos defendants are likely to be in bankruptcy within 24 months.").

II. THE SUBJECT MASS TRIAL PLAN VIOLATES DUE PROCESS AND WILL WORSEN THE CRISIS.

It is against this backdrop that the instant Petition for a Writ of Certiorari should be evaluated. Mass aggregations of asbestos claims, such as the subject West Virginia plan, not only raise serious constitutional due process problems, they also represent unsound public policy because they worsen the asbestos litigation domino effect.

Undoubtedly, the West Virginia court's trial plan is well-intentioned. As former Michigan Supreme Court Chief Justice Conrad L. Mallett, Jr. has explained, courts in West Virginia and elsewhere may view "mass joinder" and "jumbo" consolidations as a quick way to resolve the worsening asbestos litigation problem. *See* Mallett Testimony at 6 ("Think about a country circuit judge who has dropped on her 5,000 cases all at the same time . . . . The judge's first thought then is, "How do I handle these cases quickly and efficiently?" The judge does not purposely ignore fairness and truth, but the demands of the system require speed and dictate case consolidation even where the rules may not allow joinder."). The Supreme Court of Appeals of West Virginia has itself acknowledged that the lack of an administrative or legislative solution to the litigation "has effectively forced the court to adopt diverse, innovative, and often non-traditional judicial management techniques to reduce the burden of asbestos litigation that seem to be paralyzing their active docket." *State ex rel. Appalachian Power Co v. MacQueen,* 479 S.E.2d 300, 304 (W. Va. 1996). The trial plan

challenged here is certainly "innovative" and "non-traditional."

The February 26, 2002 Trial Scheduling Order entered by West Virginia Circuit Court Judge Martin Gaughan calls for a September 23, 2002 mass trial to decide the liability of hundreds of defendants to approximately 8,000 plaintiffs in a decisive "asbestos Gettysburg." The first phase of the trial will be composed of three trials of three different groupings of defendants: premises owners, employers, and manufacturers (this group includes Petitioners and over a hundred other defendants). Each of these trials is supposed to determine the alleged "fault" of the many defendants in the group. *See* Appendix Accompanying Mobil's Petition for a Writ of Certiorari at 26a. There will be virtually no opportunity for any defendant to contest the individual claims against it. As stated in the Petition:

> A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial. And defendants will have no opportunity to show that the particular claims have no connection to West Virginia, so that application of West Virginia law is precluded by established due process principles.

Pet. for a Writ of Cert. at 2.

The "fault" phase will be followed by the determination of punitive damages issues – before any determination of causation or injury. For any defendant whose conduct gives rise to punitive damages liability, the jury will set a "punitive damages multiplier" – that is the number by which any subsequent award of compensatory damages should be multi-

plied to arrive at a punitive damages award.[8] Causation and compensatory damages will be decided only after the fault phase is completed.

One its face, the mass trial plan "so departs from [the] accepted norm as to be presumptively violative of due process." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). The plan also is in clear conflict with decisions by the United States Court of Appeals for the Second and Fifth Circuits. Those courts have held that due process does not permit the overbroad aggregation of widely disparate claims without any review for commonality or risk of prejudice to the litigants. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997). *See also Cain v. Armstrong World Indus.*, 785 F. Supp. 1448 (S.D. Ala. 1992); *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996); *Union Pac. Res. Group, Inc. v. Hawkins*, 51 S.W.3d 741, 7459 (Tex. App. 2001). As the Second Circuit stated in an asbestos case, "[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992); *see also Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) ("The benefits of efficiency can never be purchased at the cost of fairness.").

It is apparent that the West Virginia plan assumes that the otherwise confusing trial process will be simplified, and that post-trial review will be precluded, by the forced settle-

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[8] *See In re Asbestos Litig.*, Civ. Action No. 02-C-9004 (Cir. Ct. Kanawha Cty., W. Va. Aug. 12, 2002) (transcript of hearing before Judges Arthur M. Recht, Booker T. Stephens, and Alan D. Moats).

ment of large numbers of claims. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir.) (Posner, J.), *cert. denied*, 516 U.S. 867 (1995) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) ("legalized blackmail"). The threat of potentially massive punitive damages liability is further evidence of the mass trial plan's coercive intent.[9] Using such leverage to force large block settlements of cases is certainly a quick way to clear lower court's docket, but the Constitution does not permit courts to trample over litigants' due process rights in this fashion. In our civil justice system, the ends do not justify the means. This basic fact was at the core of this Court's decisions in *Amchem*, 521 U.S. at 629 (invalidating proposed class action settlement of thousands of asbestos claims because the settlement failed to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure), and *Ortiz*, 527 U.S. at 846 (relying on constitutional concerns as well as Rule 23 to invalidate proposed settlement).

While the protection of fundamental due process rights alone provides ample reason for this Court to grant the subject Petition for a Writ of Certiorari, compelling public policy concerns also supports the issuance of a Writ. The his-

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[9] Imposition of punitive damages in today's asbestos litigation environment is especially irresponsible, as both the Third Circuit Court of Appeals and the Judicial Conference have stated. Punitive damage awards help speed asbestos defendants down the path to bankruptcy and threaten the availability of funds needed to compensate sick claimants. *See Dunn v. Hovic*, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993); Judicial Conference Report, *supra*, at 32. *See also* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001).

tory of the asbestos litigation makes clear that bending procedural rules to put pressure on defendants to settle brings no lasting efficiency gains. *See* Eskridge Testimony, *supra*, at 39-40. In fact, such procedures have made the litigation dramatically worse. *See* Schwartz & Lorber, *supra*, at 248. They encourage more filings by the unimpaired, jeopardize recoveries by the truly sick, result in additional bankruptcies, and lead to greater pressure on solvent "attenuated defendants. *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 278 (2001) ("the very strategies courts have devised to deal with such claims facilitate the bringing of more mass tort claims"). As one West Virginia trial judge involved in asbestos litigation has ruefully acknowledged:

> I will admit that we thought that [an early mass trial] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn't consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.

In re Asbestos Litig., Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (transcript of hearing before Judge John A. Hutchinson). *See also* Hon. Helen E. Freedman, *Product Liability Issues in Mass Torts – View from the Bench*, 15 Touro L. Rev. 685, 688 (1999) (judge overseeing New York City asbestos litigation stating that "[i]ncreased efficiency may encourage additional filings and provide an overly hospitable environment for weak cases.").

III. THE INSTANT PETITION SHOULD BE GRANTED.

Many of the issues that have worsen the asbestos litigation crisis are traditional matters of state common law that

are not frequently reviewed by this Court. But, this Court has not been hesitant to weigh in on particular issues where the federal role is clear. For example, the Court has been accepted review of asbestos cases involving federal statutes or rules. *See, e.g., Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997) (declining to recognize medical monitoring as a cause of action under the Federal Employers' Liability Act ("FELA")); *Amchem, supra*; *Ortiz, supra*. This term, the Court in *Norfolk & Western Ry. Co. v. Freeman Ayers et al.*, No. 01-963 (U.S. 2002), will decide whether FELA plaintiffs must follow the accepted common law requirement that emotional injuries, such as fear of developing cancer in the future, are compensable only if manifested in some objective form, and whether full joint and several liability applies in FELA cases. *See* Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat'l L.J., Apr. 29, 2002, at A12. Safeguarding due process rights is another important role for this Court, and one that the Court is perhaps uniquely situated to handle.

With regard to the *Ayers* case, this action must be viewed as a necessary companion. Otherwise, whatever guidance this Court gives to state common law courts through its *Ayers* opinion will be substantially undermined. The most clear and sound rules will not matter if state courts are permitted to adopt procedural shortcuts that deny litigants the fair opportunity to have those rules applied at trial and subject to post-trial review.

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Ultimately, as this Court and others have recognized, only Congress can provide a comprehensive national solution to the asbestos litigation crisis. *See Ortiz*, 527 U.S. at 821 ("[T]he elephantine mass of asbestos cases . . . defies customary judicial administration and calls for national legislation."); *id.* at 865 ("'[T]he elephantine mass of asbestos

cases' cries out for a legislative solution.") (Rehnquist, C.J., joined by Scalia and Kennedy, J.J., concurring) (internal citation omitted).[10] But, until such legislation is enacted, this Court should do everything it can to address issues in the litigation that threaten constitutional rights. This is such as case. This Court should grant the Petition and insist that lower courts respect due process and return to sound rules in asbestos cases. As Senior United States Circuit Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals noted nearly a decade ago, courts must begin to be part of the solution:

> It is time – perhaps past due – to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. * * * It is judicial paralysis, not activism, that is the problem in this area.

Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993).

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[10] *See also Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 313 (5th Cir. 1998) ("There is no doubt that a desperate need exists for federal legislation in the field of asbestos litigation.") (internal citation omitted); *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419, 425-26 (W. Va. 2002); *State ex rel. Appalachian Power Co. v. MacQueen, III*, 479 So. 2d 300, 304 (W. Va. 1996); Judicial Conference Report, *supra*, at 3 ("The Committee firmly believes that the ultimate solution should be legislation . . . creating a national asbestos dispute resolution scheme . . . .").

CONCLUSION

For the foregoing reasons, *amicus curiae* Coalition for Asbestos Justice, Inc. requests that this Court grant the Petition for a Writ of Certiorari in this action.

Respectfully submitted,

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